

PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298



October 21, 2003

Agenda ID #2893

TO: PARTIES OF RECORD IN APPLICATION 03-06-031

This is the draft decision of Administrative Law Judge Thomas. It will not appear on the Commission's agenda for at least 30 days after the date it is mailed. The Commission may act then, or it may postpone action until later.

When the Commission acts on the draft decision, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

Parties to the proceeding may file comments on the draft decision as provided in Article 19 of the Commission's "Rules of Practice and Procedure." These rules are accessible on the Commission's website at <http://www.cpuc.ca.gov>. Pursuant to Rule 77.3 opening comments shall not exceed 15 pages. Finally, comments must be served separately on the ALJ and the assigned Commissioner, and for that purpose I suggest hand delivery, overnight mail, or other expeditious method of service.

/s/ Angela K. Minkin
Angela K. Minkin, Chief
Administrative Law Judge

ANG: avs

Decision **DRAFT DECISION OF ALJ THOMAS** (Mailed 10/21/2003)**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

In the Matter of the Application of SBC Pacific
Bell Telephone Company (U 1001 C) for
Authority Pursuant to Public Utilities Code
Section 851 to Lease Space to Pacific Telesis and
SBC Services Inc.

Application 03-06-031
(Filed June 23, 2003)

**DECISION ON SBC CALIFORNIA'S
APPLICATION TO LICENSE SPACE TO AFFILIATE****I. Summary**

In this decision, we allow SBC Pacific Bell Telephone Company (SBC) to enter into a revocable license with its affiliate SBC Services, Inc. (SBCSI) for use of vacant space SBC owns at 39 Beta Court in San Ramon, California. We find that SBC is not required to file an application pursuant to Public Utilities Code § 851 for permission to license the space, but rather may enter into the revocable license without Commission approval under the Commission's General Order (GO) 69-C.

However, we impose conditions on SBC's use of GO 69-C, so that this Commission's Office of Ratepayer Advocates (ORA) has the ability to review such transactions in advance and to raise objections in appropriate cases.

II. Discussion**A. Use of Space**

The 12,000 feet of space at issue has been vacant since mid-2001. SBC does not plan to use the space in the future, but if this situation changes, the license is fully revocable at SBC's discretion. The space will house SBCSI

personnel who support the provision of E911 equipment. The license will permit these SBCSI workers to be located near SBC utility employees who sell and distribute E911 equipment.¹

B. GO 69-C Criteria

GO 69-C provides a narrow exception to § 851's requirement for advance Commission approval of any sale, lease, assignment, mortgage or encumbrance of utility property. Under GO 69-C, utilities may, in certain circumstances, convey limited, revocable uses of utility property, such as easements, licenses, permits or other limited use of land, to third parties without prior Commission approval.

GO 69-C establishes three key criteria for permitting a utility to grant minor interests in utility property without Commission approval pursuant to § 851, as follows:

- The interest granted must be for a “limited use” of utility property;²
- The interest granted must not interfere with the utility's operations, practices and service to its customers;
- The interest granted must be revocable either upon the order of the Commission or upon the utility's

¹ In its original application dated June 23, 2003, SBC proposed to lease an additional 9,500 square feet of space to Pacific Telesis Group. In an amendment to the application filed on August 6, 2003, SBC informed the Commission that Pacific Telesis no longer sought to lease the space, and therefore withdrew that portion of its application.

² G.O. 69-C does not authorize utilities to grant permanent, irrevocable interests in utility property to third parties or to permit permanent, physical changes to utility property by or on behalf of third parties.

own determination that revocation is desirable or necessary to serve its patrons or consumers.³

We believe that the proposed license agreement here meets each of these requirements, as discussed below.⁴

1. Limited Use

The proposed agreement affects a limited part of 39 Beta Court, which is an SBC-owned administrative building containing 66,000 square feet of space. It only affects space that is currently unused. No irreversible alteration of the space is planned.

2. Non-Interference with SBC Operations, Practices and Services

SBC has represented in the application that SBCSI's activities under the proposed license agreement will not impair or affect SBC's ability to provide utility service, and there has been no evidence to the contrary.

3. Revocability

The standard terms of the license are contained in a general agreement (Contract Number 3S1) between the SBC local exchange companies and SBCSI dated as of January 1, 2003, and provide that the license is revocable.⁵ Paragraph 15 of the general agreement regarding termination reads:

³ See D.02-10-057, finding of fact 3.

⁴ Since G.O. 69-C applies to this application, we need not address SBC's alternate request for approval pursuant to § 851.

⁵ Application, Exhibit G (*General Agreement Between SBC Local Exchange Companies: Nevada Bell Telephone Company, Pacific Bell Telephone Company, Southwestern Bell Telephone, L.P., the Southern New England Telephone Company, Illinois Bell Telephone Company, Indiana Bell Telephone Company, Incorporated, Michigan Bell Telephone Company, The Ohio Bell Telephone Company, Wisconsin Bell, Inc. (Seller) and SBC Services, Inc. (Buyer)*), ¶ 15 ("Term and Termination").

This agreement shall be effective January 1, 2003 and shall continue in effect until terminated by either party as provided below. Either party may terminate this Agreement in whole or in part upon giving at least thirty (30) days advance written notice to the other party.

C. 851 Review vs. GO 69-C

ORA initially protested the application,⁶ and then withdrew its protest on the condition that SBC formally commit to a lease arrangement pursuant to § 851 rather than a GO 69-C license arrangement. ORA explained that, “public notice and scrutiny of leases of regulated assets by the Commission and other parties prior to approval is a critical element of the Commission’s public process.”⁷

We agree that there should be some scrutiny of these transactions, but at the same time are concerned that requiring a lease (rather than a revocable license) in every case where SBC wishes to let space to an affiliate⁸ would unduly constrain utility operations. A revocable license allows the utility the flexibility to ask the affiliate to leave the space if it becomes necessary, whereas a lease could constrain the utility for months or years (or cost it the price of a lease

⁶ *Protest of the Office of Ratepayer Advocates*, filed July 28, 2003.

⁷ See ORA *ex parte* letter to ALJ Thomas dated Aug. 27, 2003, as confirmed in *Brief of the Office of Ratepayer Advocates Regarding Regulatory Procedures for Utility Affiliates Leasing Office Space from Regulated Utilities* (ORA Brief), filed Sept. 4, 2003.

⁸ We do not agree with ORA that a license under GO 69-C can never include an agreement to let space. See ORA Brief at 3. If the agreement is revocable and meets the other GO 69-C requirements, a license can include agreements to allow an affiliate to occupy space owned by SBC.

buy-out) if it needed to reclaim the space. Therefore, we find that a GO 69-C revocable license is preferable to a § 851 lease in this case.

We note that SBC seeks direction from this Commission as to whether it should seek approval for its transaction under § 851, or whether it may proceed under GO 69-C. In response, we believe the appropriate clarification should be made.

Where SBC seeks to lease space to an affiliate, the concerns ORA raises come into play. There may be a need to verify that SBC is properly charging its affiliate for the space, and to assess whether SBC is unduly favoring its affiliates over competitors. Therefore, we believe that in such cases, SBC should file an application as it has in this case seeking direction from the Commission as to whether § 851 approval is required or whether SBC may proceed under GO 69-C. The Commission may then direct SBC on the appropriate outcome as it is doing here.

Where, on the other hand, SBC is seeking to license space to a non-affiliate third party in an arm's length transaction, we believe it appropriate for SBC to proceed under GO 69-C as long as the three criteria we note above are satisfied. That is, no GO 69-C license transaction is ever appropriate unless the interest granted 1) is for a limited use of utility property, 2) does not interfere with the utility's operations, practices and service to its customers, and 3) is revocable either upon the order of the Commission or upon SBC's own determination that revocation is desirable or necessary to serve its patrons or consumers.

To ensure that the Commission is able to audit SBC's GO 69-C transactions with non-affiliates, SBC should maintain records adequate for the Commission to audit these transactions. At the very least, SBC should be able to

produce on Commission request a list of each GO 69-C license transaction, the date of the transaction, the licensee, the affected property, and the reasons why the transaction meets the three GO 69-C criteria listed above.

III. Comments on Draft Decision

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Section 311(g)(1) of the Public Utilities Code and Rule 77.7 of the Rules of Practice and Procedure. Comments were filed on _____, and reply comments were filed on _____.

IV. Assignment of Proceeding

Michael R. Peevey is the Assigned Commissioner and Sarah R. Thomas is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. The proposed license agreement is for a “limited use” consistent with GO 69-C.
2. The proposed license agreement will not interfere with SBC’s operations, practices or provision of services to its customers.
3. The proposed license agreement is revocable at will as required by GO 69-C.

Conclusions of Law

1. The proposed license agreement is authorized by GO 69-C and the requirement for prior Commission approval pursuant to § 851 does not apply.
2. Since the Commission need not further consider this application, the application should be dismissed.
3. Requiring a lease (rather than a revocable license) in every case where SBC wishes to let space to an affiliate would unduly constrain utility operations. A revocable license allows the utility the flexibility to ask the affiliate to leave the space if it becomes necessary, whereas a lease could constrain the utility for

months or years (or cost it the price of a lease buy-out) if it needed to reclaim the space.

4. Where SBC seeks to lease space to an affiliate, there may be a need to verify that SBC is properly charging its affiliate for the space, and to assess whether SBC is unduly favoring its affiliates over competitors. Therefore, in such cases, SBC should file an application seeking direction from the Commission as to whether § 851 approval is required or whether SBC may proceed under GO 69-C.

5. Where SBC is seeking to license space to a non-affiliate third party in an arm's length transaction, it is appropriate for SBC to proceed under GO 69-C as long as the three GO 69-C criteria are satisfied.

6. No GO 69-C license transaction is ever appropriate unless the interest granted 1) is for a limited use of utility property, 2) does not interfere with the utility's operations, practices and service to its customers, and 3) is revocable either upon the order of the Commission or upon SBC's own determination that revocation is desirable or necessary to serve its patrons or consumers.

7. To ensure that the Commission is able to audit SBC's GO 69-C transactions with non-affiliates, SBC should maintain records adequate for the Commission to audit these transactions. At the very least, SBC should be able to produce on Commission request a list of each GO 69-C license transaction, the date of the transaction, the licensee, the affected property, and the reasons why the transaction meets the three GO 69-C criteria.

O R D E R

IT IS ORDERED that:

1. SBC Pacific Bell Telephone Company (SBC) may grant a revocable license to its affiliate SBC Services, Inc. (SBCSI) for the use of 12,000 square feet of space

at 39 Beta Court in San Ramon, California, pursuant to General Order (GO) 69-C without prior Commission approval.

2. Where SBC seeks to lease space to an affiliate, SBC shall file an application seeking direction from the Commission as to whether § 851 approval is required or whether SBC may proceed under GO 69-C.

3. Where SBC is seeking to license space to a non-affiliate third party in an arm's length transaction, SBC may proceed under GO 69-C as long as the following three criteria are satisfied. No such GO 69-C license transaction is appropriate unless the interest granted 1) is for a limited use of utility property, 2) does not interfere with the utility's operations, practices and service to its customers, and 3) is revocable either upon the order of the Commission or upon Pacific's own determination that revocation is desirable or necessary to serve its patrons or consumers.

4. To ensure that the Commission is able to audit SBC's GO 69-C transactions with non-affiliates, SBC shall maintain records adequate for the Commission to audit these transactions. At the very least, SBC shall be able to produce on Commission request a list of each GO 69-C license transaction, the date of the transaction, the licensee, the affected property, and the reasons why the transaction meets the three GO 69-C criteria listed above.

5. This application is dismissed.

This order is effective today.

Dated _____, at San Francisco, California.